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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 53

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Petitioner,

vs.

MRS. OLENA MOSER, ADMINISTRATRIX, Respondent.

On Certiorari to the Court of Civil Appeals of Texas, Third Supreme Judicial District.

BRIEF FOR RESPONDENT

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STATEMENT AS TO WANT OF JURISDICTION.

Respondent represents that by the rulings of the Court of Appeals petitioner was denied no title, right, privilege or immunity to which it was entitled under the Employers Liability Acts of Congress.

The instructions given by the trial court upon the measure of damages to be awarded were correct and are not subject to the crit-

icisms urged by petitioner. These instructions are in accord with the decisions of this court in C. & O. Railway Co. vs. Kelley 241 U. S. 485; M. C. Railway Co. vs. Vreeland 227 U. S. 59 and L. & N. Railway Co. vs. Holloway 246 U. S. 525. The language of the charge to the jury was that they should fix same "at such sum of money, as if paid in cash at this time, would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss as you may believe from the evidence that they had a reasonable expectation of receiving from said John H. Moser, if any, from and after the death of John H. Moser, if he had not died on the date alleged," etc.

The language, "as if paid in cash at this time," clearly encompassed present value of future expectations (Rec. 21). The Court of Civil Appeals, in its decision, adheres to the doctrine of this Court and its rulings in the C. & O.-Kelley Case, that plaintiff is entitled only to recover the present value of future contributions.

STATEMENT OF THE CASE.

J. H. Moser, a Railway Brakeman, was killed on the Gulf, Colorado & Santa Fe Railroad while engaged in the performance of his duties as an employee. His administratrix brought suit for the benefit of his widow and infant daughter, an action under the Fed-

eral Employers Liability Act, in a State Court in Texas. A verdict was rendered for $34,000.00. Judgment was entered on this verdict and was affirmed by the Court of Civil Appeals for the Third Supreme Judicial District of Texas, 277 S. W. Reporter 722. The death of deceased J. H. Moser was the result of negligence on the part of the railway company in hauling in its moving train a car in such dangerous condition that the floor of the car gave way as he was passing over the same, causing him to fall through to his death.

TESTIMONY AS TO MOSER'S EARNINGS AND THE VALUE THEREOF.

Moser was only twenty-eight years old at the time of his death; had no bad habits; was in good health; strong, sober, industrious and efficient; and when not employed, at home with his family. (Rec. 78.) He had a public school education; was a good man; a devoted father and husband and a man who loved his family. (Rec. 91). (126.)

During the five years preceeding his death, not taking into account the time he was absent in the World's War, he had earned an average of more than $2,000.00 a year. (Rec. 86, 117 and 150). According to United States Mortality Tables he had a life expectancy of 36.73 years (Rec. 92). According to

the rules of seniority in vogue with the railway company and its employees, he was in line for promotion to the position of conductor, and would probably have been promoted with an increase of pay within a few years, and had a reasonable expectancy of an average annual income of about $2,3000.00 for th remainder of his life or an aggregate total income of about $84,000.00 (Rec. 124).

TESTIMONY AS TO INTEREST RATES.

The witness Harrison on cross-examination testified: "It requires experience and skill to handle money in reasonable amounts. That in Texas and other parts of the country some money is loaned on safe securities at 3 1-2 to 4 1-2 per cent (Rec. 80)."

Ed Temple, a conductor for the Gulf, Colorado & Santa Fe Railway Company, testified that he received from 8 to 10 per cent on loans of money in the county of trial court; admitted on cross-examination that he rendered his notes for taxes and paid taxes for state, county and city aggregating $3.50 on valuation of $100.00, (Rec. 96).

The witness C. G. Cloud testified: "I know something of the different character of investments made in this country by men of means. I know that loans which are made by the issuance of bonds over a period of time, safe and sound securities on government

bonds and on bonds of big concerns, loans of that kind are made not exceeding 4 per cent, and I also know that in the investment of any capital, that experience and skill is required in making safe investments, (Rec. 118).

Petitioner in its brief has correctly set out the charge of the trial court on the measure of damages. (Brief for petitioner page 19.)

TESTIMONY OF THE JURY.

J. J. Miller testified: "I tried to listen to all the evidence in the case, and after hearing all the testimony, I undertook as best I could, under the Court's charge, to allow in damages what I thought the parties were entitled to receive, and I took nothing into consideration outside of the evidence in doing that."

The Juror T. E. House testified: "I listened attentively to all the evidence in this case and to the court's charge, and under the Court's charge and under the testimony, I undertook to give in damages the amount I thought plaintiffs' were entitled to receive. I did not use figures, only in my head. Some of the men did. I did not write down any figures and undertake through a process of mathematical calculation to arrive at the correct figure, but after listening to all the testimony and considering the Court's charge, I undertook to allow what I thought they were entitled to recover. I do not know what men-

tal process each of the other jurors had in arriving at the figures and the amounts they were for."

The Juror M. L. House testified: "After listening to all the testimony in the case, under the Court's charge, as I interpreted it, I undertook, according to my best judgment, to allow just what I thought the plaintiff was entitled to receive and no more. I did not undertake in coming to my conclusions anything further than a general consideration of all the evidence in the case and the Court's charge. The Court had charged us that we should allow to the plaintiffs such an amount as if paid at this time would compensate for the loss they had sustained by reason of his death. That is the way I tried to arrive at it, and I thought they were entitled to $40,000.00.

There was nothing discussed by the jury outside of the evidence and the Court's charge in our deliberations, that I know of. No discussion was made of any expense to which the plaintiff would be by reason of litigation, and no discussion was made as to reaching a verdict by lot, or by adding up and dividing what the jurors were for by twelve. The jury was unanimous on each of the issues submitted to them in deciding each question just as they were answered, except as to the amount, and we did all that at first, and every man on the jury was in favor of answering each

question as it was answered and presented by the Court, except when we came to fixing the amount of damages, and on the subject of amount the jury took a ballot merely. We entered into no mathematical calculations, but took a ballot as to what each of us thought they were to receive. On the first ballot, without any attempt by the jury to make any mathematical calculations, each juror merely wrote down what verdict he was in favor of. Six of the jurors were for $30,000.00, one for $35,000.00 and five for $40,000.00. At no time did the jury enter into any mathematical calculations figuring rates of interest or the values of annuities or discuss any particular evidence along those lines, but we fixed these amounts and finally got together on $34,00000. I undertook, according to the best light I had before me, to return a just verdict under the evidence and the Court's charge. (Rec. 65 and 66.)

The testimony of the Juror Hudson was to the same effect. (Rec. 67 and 68.)

The Juror J. Y. Moreland testified in substance to the same effect and further: "The way in which I reached in my own mind what plaintiffs were entitled to receive was that I considered the evidence relating to how much the deceased was earning and his life expectancy and according to my figures that would run up to about $64,0000.00, and I thought to pay this at that time a reasonable award to

plaintiff and was the amount I was for. I did not take a piece of paper and did not figure nor did the jury as a whole arrive at its verdict by means of any such calculations. We merely arrived at a verdict by each man writing down on a piece of paper the amount he was for, ranging from $30,000.00 to $40,000.-00, and we finally got together and agreed on $34,000.00. There was no discussion in the jury room that we should take the respective amounts, add them together and divide them by twelve to arrive at our verdict, and we did not do that. There was no discussion in the jury room that we should give to his wife and child what he would have made in his entire life. There was no discussion in the jury room that we were to allow at this time only one-half of what he would make to his family and allow that all at this time without taking into consideration its present cash value. We merely arrived at our verdict by agreeing on $34,000.00, after discussing several different amounts under the testimony and under the Charge of the Court. (Rec. 70 and 71.)

The Juror E. W. Dunlap testified: "I understood we should take into consideration what he was earning and should pay them at this time what would justly compensate them for the pecuniary loss they had sustained. I did not undertake to give to them what I thought he would contribute to them during his entire life, if he had lived, but to pay them

at this time what would justly compensate them for the loss they had sustained. (Rec. 72.)

The Juror Cass testified: "We figured on what Mr. Moser was earning. We figured on how much Mr. Moser would make in 36 years, his expectancy. You remember you lawyers figured how much that would come to and made these figures and we had them. We did consider how much he may have contributed each year to his wife and child, and as near as I remember it multiplied it by thirty-six years that he had to lived. I do not know that I at any time figured on that money as to what it would earn so as to reduce it to a present value. I did not make any calculations of interest at 8 per cent or 6 per cent or 7 per cent, and made no attempt to reduce the payment paid annually to a present value to calculate how much if paid now would amount to the same as a payment made each year at a given rate of interest. As far as I know, there was no misunderstanding of the jury in any way or misconduct of the jury or any discussion of any improper matters. (Rec. 73 and 74.)

The Juror R. H. Giles testified: "I listened to all the evidence in this case and undertook, according to my best judgment, to return a verdict under the evidence and the Court's charge, which would be a just verdict. As far as I know there was no misconduct of

the jury or any discussion of improper matters. After hearing this evidence and considering it all, according to my best understanding, I was for $40,000.00. I did not undertake to say in my mind that because he would probably make $80,000.00 or more during his lifetime, she would be entitled to receive that all now. I was merely undertaking to give his wife and child that amount that would compensate them for his death for their pecuniary loss, as the Court charged us. (Rec. 74-75.)

The Juror J. F. DuBose testified: "I listened to all the testifony that was offered by the plaintiff and defendant. I heard the testimony as to probable life-expectancy and the testimony as to his earnings; what he had made in the past and what he would probably make in the future. Q. According to your best judgment, of course you don't recall the exact words of the Court's charge, but if the Court charged you that you should allow to Mrs. Moser at this time such an amount in damages as if paid at this time would justly compensate her for the pecuniary loss sustained by her, at the time of his death, is that what you tried to do? A. I tried to do according to the Court's charge. (Rec. 76.)

COUNTER PROPOSITIONS TO PETITIONER'S SPECIFICATIONS OF ERROR.

Counter Proposition to Specification (1)

The charge of the trial court to assess the damages "at such sum of money as if paid in cash at this time as would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss as you may believe from the evidence that they had a reasonable expectation of receiving," etc., was correct. This was a clear, definite and specific instruction to award only present value of future contributions. However, inas much as the charge as given was correct, if the defendant in the trial court had desired a supplemental instruction, it cannot complain unless it had prepared and requested a special charge correctly presenting the same.

Counter Proposition to Specification (2)

The trial court did not err in refusing to give special charge No. 8, which erroneously sought to subject the jury's estimate to the rigid mathematical calculation that the money would be worth to the widow and minor child the highest rate of interest that the testimony showed had been made in Texas, on money safely invested, and that, although the testimony showed that interest on money invested on different classes of securities ranged from 3 1-2 per cent to 8 per cent and that

in making investments of money on the various classes of securities experience and skill are required.

Counter proposition to Specification (3)

The amount of the award is not excessive. Is amply supported by the evidence; this was a question to be dealt with by the trial court and is not reviewable here.

Counter Proposition to Specification (4)

There being no misconduct on the part of the jury, no improper discussion during its deliberations, no new evidence received, each member of the same having heard and considered the evidence and the charge of the Court, as he understood it, the testimony of individual jurors as to how they reached their conclusions will not be inquired into. The verdict of the jury cannot be impeached in the absence of misconduct by showing the mental processes and calculations which guided the respective jurors, and this, like all other questions of procedure, is to be determined by the law of the forum.

Counter Proposition to Specification (5)

Defendant in the trial court was not entitled to an instruction that the award of damages to be made to the surviving wife and child for the loss of future contributions in the nature of pecuniary benefits should be

reduced by the amount of the value of the probable services they would have rendered the deceased, had he continued to live.

Counter Proposition to Specification (7)

It appearing from the testimony that the deceased was a man of education, good character and habits, devoted and attentive to his child, industrious and efficient, spending his time, when not employed in the performance of his duties, at home, the jury were properly instructed that they might consider the pecuniary loss, if any, suffered by the minor child by reason of his death, such advice and training as the evidence might show the child would have received after the time of his death and during the period of the child's minority.

Counter Propositions to Specifications 6 and 8

Defendant was not entitled to have the jury instructed, as requested in either of these special charges. The same were upon the weight of the evidence and related only to matters for proper argument to the jury.

ARGUMENT

The charge of the trial court correctly applied the rule for the measure of damages as laid down by this Court in the case of C. & O. vs. Kelley. The charge of the Court, in lan-

guage as forceful, clear, unmistakable and specific as the same could be made, instructed the jury on present values, that is, "such sum of money, as if paid in cash at this time, will be sufficient to compensate for such actual pecuniary loss as the surviving wife and child, from the evidence, had a reasonable expectation of receiving from said John H. Moser, if any, from and after the death of John H. Moser, if he had not died on the date alleged," etc.

The Court of Civil Appeals in the decision of this case and in the words of its opinion did not hold that plaintiff was entitled to recover the full value of future contributions as of the time they might be received, but on the contrary held that plaintiffs could only recover present value of anticipated pecuniary contributions, and the Court of Civil Appeals in its opinion used the following language:

"Appellant labors at great length to show that the trial court did not instruct the jury to reduce such future contributions as appellee's had a right to expect from the deceased had he lived to a present value. We find no merit in this. The language of the charge was that they should fix same "at such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss," etc. The language "at this time" clearly encompassed present value of future ex-

pectations. In addition evidence as to annnuities, interest rates, interest bearing investments, etc., was introduced for the purpose of determining such present value, and the case was tried on that theory." (Rec. 128.)

This Court in the Kelly Case, 141 U. S. 485, speaking through Mr. Justice Pitney, said:

"The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. . . . . We do not mean to say that the discount should be at what is commonly called the "legal rate of interest", that is, the rate limited by law, beyond which interest is prohibited. It may that such rates are not obtainable upon the investments on safe securities; at least without the exercise of financial experience and skill in the administration of the fund, and it is evident that the compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill, however, where this is necessarily employed, the interest return is in part earned by the investor rather than by the investment. This, however, is a matter that ordinarily should be adjusted by scaling the rate of interest to be adopted in computing the present value of the future benefits, it being a matter of common knowledge that as a rule the best and safest investments and

those which require the least care, yield only a moderate return.

"We are not in this case called upon to lay down a precise rule or formula, and it is not our purpose to do this, but merely to indicate some of the considerations that support the view we have expressed; that in computing the damages recoverable for the deprivation of future benefits the principle of limiting the recovery to compensation requires that adequate allowance be made according to circumstances for the earning power of money. In short, when future payments or other pecuniary benefits are to be anticipated, the verdict should be made upon basis of their present value only.

"We are aware that it may be a difficult mathematical computation for the ordinary juryman to calculate interest on deferred payments with annual rests and reach a present cash value. Whether the difficulty should be met by admitting testimony of expert witnesses or by receiving in evidence the standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods covering the ordinary expectancies of life, it is not for us in this case to say. Like other questions of procedure and evidence, it is to be determined according to the law of the forum.

"Vicksburg–M. R. Company vs. Putnam

118 U. S. 545, review of a judgment recovered in a circuit court of the United States in an action for personal injuries where the damages claim included compensation for the impairment of plaintiff's earning capacity. Assuming for the purpose of illustration that plaintiff's expectancy of life was thirty years. The trial judge instructed the jury that it would not be proper to allow him in gross the sum of the annual losses during his expectancy, that for the annuity will be payable one part this year and another part next year and each of the thirty parts payable each of the thirty years. You must have a sum such that when he dies it will all be used up at the end of thirty years. Having called attention to certain tables that were in evidence, he proceeded to say, "Add that to the present worth of annuity if you find he was damaged.' The judgment was reversed. not because of the recognition of the rule of present values, but because of the conclusive force that was given by the trial judge to the life and annuity tables. In the course of the opinion the court by Mr. Justice Gray said (page 554) that the compensation should include 'a fair recompense for the loss of what he would otherwise have earned in his trade or profession and has been deprived of the capacity of earning by the wrongful act of the defendant . . . . .' In order to assist the jury in making such estimate, standard life and annuity tables showing at any age the probable

duration of life and the present value of the life annuity are competent evidence . . . . . But it has never been held that the rules to be derived from such tables or computations must be the absolute guides of the judgment and the conscience of the jury."

Even if the charge of the Court had been insufficient to instruct the jury specifically to reduce future expectations of pecuniary benefits to present values, petitioner cannot complain unless it had requested a supplemental instruction correctly presenting the same.

In L. & N. R. Co. vs. Holloway, 246 U. S. 525, Mr. Justice Brandeis, delivered the opinon of the Court, saying:

"Holloway, a locomotive Engineer, was killed on the Louisville & Nashville Railroad while engaged in the performance of his duties. His administrator brought, for the benefit of his widow, an action under the Federal Employers' Liability Act in a state court of Kentucky and recovered a verdict of $32,-900.00. . . . . The errors assigned in this court and now insisted upon are these:

The first assignment: That the Court of Appeals erred in approving the giving of an instruction and the refusal of another by which the trial judge had denied to the company the benefit of the rule declared in Chesapeake & O. R. Co. vs. Kelly, 241 U. S. 485, that in computing damages recoverable for

the deprivation of future financial benefits, the verdict should be based on their present value.

The third assignment: That the Court of Appeals erred in refusing to reverse the judgment of the trial court on the ground that the damages were excessive, and in holding as part of the loss of benefits the widow might have received and which the jury was entitled to consider "not only her support and maintenance of $50.00 a month, but, in addition thereto, one-half of the savings which decedent might have accumulated if he had lived out his allotted span" of life.

(The instruction given was: The measure of recovery, if you find for the plaintiff, being such an amount in damages as will fairly and reasonably compensate the widow of the said John G. Holloway, deceased, for the loss of pecuniary benefits she might reasonably have received if the deceased had not been killed, not exceeding the amount claimed; to-wit: $50,000.00.

The instruction refused was: "The Court instructs the jury that if they shall find for the plaintiff, their verdict cannot, in any event, exceed a sum which will yield, at interest at 6 per cent, a sum which will represent the proven pecuniary benefits which Mrs. Holloway received from her husband in his life-time, and had reasonable expectation of receiving from him if he had not been

killed; and the Court further instructs the jury that the amount so awarded by them should be diminished by such amount as that, by using the interest and a part of the principal sum each, the principal sum will have been exhausted at the expiration of decedent's expectancy of 28.62 years."

No other instruction on the measure of damages was given, and none was requested except an instruction, not now insisted upon, limiting the recovery specifically to $13,737.-60).

First: The instruction given though general was correct. It declared that the plaintiff was entitled to recover "such an amount in damages as will fairly and reasonably compensate "the widow," "for the loss of pecuniary benefits she might reasonably have received," but for her husband's death. This ruling did not imply that the verdict should be for the aggregate of the several benefits payable at diffrent times, without making any allowance for the fact that the whole amount of the verdict would be presently paid at one time. The instruction bore rather an implication to the contrary; for the sum was expressly stated to be that which would "compensate". The language used was similar to that in which this Court has since expressed, in Chesapeake & O. R. Co. vs. Kelly, supra, P. 489, the measure of damages which should be applied. The com-

pany had, of course, the right to require that this general instruction be supplemented by another, calling attention to the fact that, in estimating what amount would compensate the widow, future benefits must be considered at their present value. But it did not ask for any such instruction. Instead it erroneously sought to subject the jury's estimate to two rigid mathematical limitations: (1) That money would be worth to the widow 6 per cent, the legal rate of interest; (2) That the period during which the future benefits would have continued was 28.62 years, —the life expectancy of the husband according to one of several well-known actuarial tables. The company was not entitled to have the jury instructed as matter of law either that money was worth that rate, or that the deceased would not in any event have outlived his probable expectancy. See Chesapeake & O. R. Co. vs. Kelly supra pp. 490-492. Nor need we determine whether the local rule of practice, that if instructions are offered upon any issue respecting which the jury should be instructed, and they are incorrect in form or substance it is the duty of the trial court to prepare or direct the preparation of a proper instruction upon the point in place of the defective one, (See Chesapeake & O. R. Co. vs DeAtley, 241 U. S. 310-316,) was applicable in the case at bar. That is a question of state law, with which we have no concern. In the DeAtley case, the Ken-

tucky Court of Appeals assumed for the purposes of its decisions that the local rule applied, and was thereby lead to decide a question of federal law. Consequently, we had and exercised jurisdiction to review its decision upon that question.

Second: The Third Assignment, insofar as it relates to the refusal of the Court of Appeals to reverse the judgment, "'on the ground that the damages are excessive", is not reviewable here. Southern Railway-Carolina Div. vs. Bennett, 233 U. S. 80, it does not appear in the case at bar as it did in Chesapeake & O. R. Co. vs. Gainey, 241 U. S. 494, that the action of the Court of Appeals in sustaining the verdict was necessarily based upon an erroneous theory of Federal Law."

So we say in this case that it does not appear that the action of the Court of Civil Appeals in sustaining the verdict was based upon an erroneous theory of Federal Laws. On the contrary, the opinion of the Court of Civil Appeals expressly holds that plaintiffs were entitled only to recover present value of anticipated benefits.

The court did not err in refusing to give special charge No. 8, because the rule as to the correct measure of damages had already been covered by the Court's main charge, and for the reason that such special instruction would have been erroneous in that it would have subjected the jury to the rigid mathe-

matical rule of calculating interest on the basis of the amount to be awarded and that at the highest rate of interest that the testimony shows could be had on money safely invested. There was some testimony showing that money had been safely invested at 8 per cent on certain classes of securities There was other testimony showing that loans on more substantial securities were made at rates of interest not exceeding 4 per cent, and that the investment of money on each line of security required experience and skill.

That the amount of the award is not excessive is amply supported by the evidence. Plaintiff was a young man twenty-eight years of age at the time of his death. He was in good health, strong, sober, industrious, efficient, and when not employed, at home with his family; that during the preceeding five years, not taking into account the time he was absent in the World's War, he had earned an average of over $2,000.00 a year; that according to the United States Mortality Tables he had an expectancy of 36.73 years; that he would probably have been promoted to conductor with an increase in pay within a few years and had a reasonable expectancy of an average annual income of about $2,300.00 for the rest of his life, or an aggregate total expected income of about $84,000.00; that an annuity of $2,000.00 a year for thirty-six years would cost $36,720.00; that deceased

loved his family and was devoted to his child.

This Court in Southern Railway Company vs. Bennett, 233 U. S. p. 80, speaking through Mr. Justice Holmes, said:

"The supposed error most insisted upon is the entering of judgment upon a verdict said to be manifestly excessive. It is admitted that the judge charged the jury correctly according to principles established by Michigan G. R. Co. vs. Vreeland, 227 U. S. 59, but it is thought to be apparent as matter of law that the jury found more than the charge or the law allowed. The argument is this: The deceased was making not more than $900.00 a year and the only visible ground of increase was the possibility that he might be promoted from fireman to engineer, with what pay was not shown. He could not have given more than $700.00 a year to his family. His expectancy of life was about thirty years, by the tables of mortality. So, at the legal rate of interest the income from $10,000.00 for thirty years was all that the plaintiff was entitled to, whereas, she was given a principal of $20,000.00 out and out. It may be admitted that if it were true that the excess appeared as matter of law,—that if, for instance, the statute fixed the maximum and the verdict exceeded it, a question might arise for this Court, but a case of mere excess upon the evidence is a matter to be dealt with by

the trial court. It does not present a question for re-examination here upon a writ of error."

The testimony of the respective jurors as to what may have influenced them and what they may have considered in arriving at their verdict will not be heard to impeach the verdict and will not be considered for any purpose.

In Clyde Mattox, 146 U. S. 140, Mr. Chief Justice Fuller, after stating the case, delivering the opinion of the Court, said:

"The allowance or refusal of a new trial rests in the sound discretion of the Court to which application is addressed, and the result cannot be made the subject of review by writ of error, but in the case at bar, the District Court excluded the affidavits, and in passing upon the motion did not exercise any discretion in respect of the matters stated therein. . . . . .

"In United States vs. Reid, 12 Howard 361-366, affidavits of two jurors were offered in evidence to establish the reading of a newspaper report of the evidence which had been given in the case under trial, but both deposed that it had no influence on their verdict. Mr. Justice Taney delivering the opinion of the Court said: 'The first branch of the second point presents the question whether the affidavits of jurors impeaching their verdict ought to be received. It would perhaps,

hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution.' The opinion thus indicates that public policy which forbids the reception of the affidavits, depositions or sworn statements of jurors to impeach their verdicts, may in the interest of justice create an exception to its own rule, while at the same time, the necessity of great caution in the use of such evidence is enforced.

"There is, however, a recognized distinction between what may not be established by the testimony of jurors to set aside a verdict."

"This distinction is thus put by Mr. Justice Brewer, speaking for the Supreme Court of Kansas in Perry vs. Baily, 12 Kans. 539:

"Public policy forbids that a matter resting in the personal conscience of one juror should be received to overthrow the verdict, because being personal, it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve. Its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescense with the purpose of subsequent dissent.

"But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can

deny; one cannot disturb the action of the twelve".....

"The subject was much considered by Mr. Justice Gray, then a member of the Supreme Judicial Court of Mass. in Woodward vs. Levitt, 107 Mass. 453, where numerous authorities were referred to and applied and the conclusions announced, 'That on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict'."

We also refer to a most complete, exhaustive and well considered opinion on this subject the opinion being written by Justice McClendon in Caylat vs. Railway Company, 113 Texas 131.

In the case at bar there was no misconduct on the part of the jury, no improper discussion during its deliberations; no new evidence received; each member of the jury having heard and considered the evidence and the charge of the court as he understood it; the testimony of individual jurors as to how they reached their conclusions may not be considered.

It appeared from the testimony that the deceased was a man of education, of good habits, of good health, 28 years of age; that his only child was an infant daughter about sev-

enteen months old; that he was industrious and efficient; that he was a good man, spending his time, when not employed, at his home; that he loved his child and was a devoted father. This evidence fully met the requirements of this Court, as stated in M. C. Railway vs. Vreeland, 227 U. S. 59, where the following language is used:

"A minor child sustains a loss from the death of a parent and particularly of a mother altogether different from that of a wife or husband from the death of a spouse. In such a case it has been held that the deprivation is such as to admit of definite valuation. If there be evidence of the fitness of the parent and the child has been actually deprived of such advantages."

The Court of Civil Appeals in deciding this point did not decide adversely to petitioner a question, denying to it any right under Federal Law. On the contrary, it merely followed the decisions of this Court and in so doing used the following language: "When the character, education, habits and station in life of the father, the atmosphere in which his child is to be reared, and his affection for and interest in his child are shown, manifesting the fitness of the parent to furnish these elements, there was sufficient evidence to go to the jury on the loss of same, and it was within the discretion of the jury with this light before them to pass upon their value."

Citing M. C. Railway Company vs. Vreeland, 227 U. S. 59.

Mr. Justice McReynolds delivering the opinion of the Court in Norfolk & W. Railway Co. vs. Holbrook, 235 U. S. 624, said:

"In the present case there was testimony concerning the personal qualities of the deceased and the interest which he took in his family. It was proper, therefore, to charge that the jury might take into consideration the care, attention, instruction, training, advice and guidance which the evidence showed he reasonably might have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed."

Defendant was not entitled to have the jury instructed as requested in special charges set out in its specifications of error 6 and 8, and in passing upon these assignments, the Court of Civil Appeals did not decide adversely any question of right arising under Federal Law, but correctly held, as stated in its opinion, that same, "were on the weight of the evidence and related to matters which were proper for argument to the jury."

We submit that this case should in all things be affirmed.

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